TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 165.

MARGARET PENNIUS, NOW MARGARET [illegible],
PLAINTIFF IN ERROR,

vs.

THE READING SCHOOL DISTRICT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED JANUARY 8, 1910.

(16,305.)

(19,180.)

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1-12 Supreme Court of Pennsylvania, Eastern District.

Among the records and proceedings of the supreme court of Pennsylvania, in and for the eastern district, *inter alia*, the following is thus contained:

APPEARANCE DOCKET.

Docket Entries.

January Term, 1902, Berks County.

MARGARET CUNNIUS, Now MARGARET SMITH, Plaintiff,
v.
READING SCHOOL DISTRICT, Defendant. } No. 351.

351.
Frederick W. Nicolls.
C. P. 64 August term 1899
Superior court: 48 October term 1901
Appeal of defendant from the judgment.
Appeal from the *superior court*
Filed December 24, 1902
Eo die certiorari exit and directed to the court of *common pleas* of the county of *Berks*.
Ret'ble the first Monday of March 1903.
November 25, 1902.—Petition for an allowance of an appeal from the superior court to the supreme court filed:
13 December 22, 1902.—Appeal allowed
Mitchell, J.
March 2, 1903.—Record returned and filed.
Eo die assignments of error filed
March 2, 1903.—Argued
July 9, 1903.—Judgment reversed and record remitted to the court of common pleas with directions to enter judgment for the defendant *non obstante veredicto*.
Opinion by Mitchell, J.
July 16, 1903.—Remittitur exit and with record sent to the prothonotary of Berks county.
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November 23, 1903.—Writ of error to the supreme court of Pennsylvania brought into office.

November 27, 1903.—Citation with service brought into office.

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22 In the Supreme Court of Pennsylvania.

Assignments of Error to the Decree of the Superior Court of No. 48, *October Term*, 1901.

1. The superior court erred in dismissing the first assignment of error to the court below, which was as follows:

1. The court erred in discharging the rule for judgment *non obstante veredicto*, based upon the point reserved, which is as follows: "Whether, in view of the proceedings in the orphans' court to No. 91 January term 1897, there can be any recovery by the plaintiff in this case."

2. The superior court erred in affirming the judgment of the court below.

3. The superior court erred in not reversing the judgment of the court below.

FREDERICK W. NICOLLS,
Attorney for Appellant.

Endorsement: 351 January term 1902. Assignments of error to the decree of the superior court. Margaret Cunnius, now Margaret Smith, *v.* The Reading School District. Filed Mar. 2, 1903 In supreme court. Frederick W. Nicolls, Reading, Pa.

23 In the Supreme Court of Pennsylvania.

Opinion by Mitchell, J.

Filed July 9, 1903.

CUNNIUS
v.
READING SCHOOL DISTRICT, Appellant. } January Term, 1902. No. 351. C. P., Berks. Superior Court.

MITCHELL, *J.:*

The regulation of the title and devolution of property within its limits is within the control and jurisdiction of the State.

The rules of evidence for the judicial ascertainment of facts in its courts, and as a corollary, the establishment of legal presumptions, are also within the control and jurisdiction of the State.

Bearing these two axioms in mind let us examine the act of 1885 which is involved in the present case. It provides that whenever application shall be made for letters of administration on the estate of any person supposed to be dead on account of absence for seven or more years, the register of wills shall certify the application to the orphans' court, and that court, if satisfied that the applicant would be entitled to such letters were the supposed decedent in fact dead, shall cause advertise-
24 ment to be made of the application, and on the day fixed shall "hear evidence concerning the alleged absence of the supposed decedent, and the circumstances and duration thereof." If upon such hearing the court shall be satisfied that the legal presumption of death is made out it shall so decree, and forthwith cause notice to be published in a newspaper of the proper county "and also when practicable in a newspaper published at or near the place beyond the Commonwealth where when last heard from, the supposed decedent had his residence." At the end of twelve weeks from the last insertion of this notice, if no contrary evidence be forthcoming the court may order the register to issue the letters of administration, "and the said letters until revoked, and all acts done in pursuance thereof, and in reliance thereupon, shall be as valid as if the supposed decedent were really dead." It is further provided that the orphans' court may at any time revoke the letters on proof that the supposed decedent is in fact alive, whereupon the administrator shall file his account and turn over the property to the owner, who may also recover any moneys or property received by any person as widow, or next of kin, or heir. And for protection of the owner as to such persons it is required that no distribution shall be made to them until security is given approved by the court, for refunding with interest in case the supposed decedent shall in fact be alive, and in case of inability to give such security the money shall be invested under the control of the court,
25 and the interest only paid to the distributee. Section 6 contains provisions as to suits by or against the administrator, and the substitution of the supposed decedent after revocation of the letters. This section will be referred to later on.

From this summary it appears that the act establishes a system, carefully wrought out with due regard to all rights involved, for the administration of estates or property whose owner is legally presumed to be dead, but whose death cannot at the time be proved with absolute certainty. It is a wise and just statute of sequestration and conservation of property which is without a known owner, whether the late owner has abandoned it (as in the present case) or the title has devolved upon others by his death, not being presently ascertainable. The statute steps in to provide a caretaker and to vest the present benefit in those who appear to be the owners, with as complete provision as is practicable for the re-establishment of the rights and possession of the absentee on his reappearance. That the State must have some such power is manifest. The property is

within its jurisdiction and under its protection. It is not in the interests of order or good government that property should lie ownerless or open to conflicting claims. If the absentee be really dead it is conceded that the proceeding is unimpeachable. But if he be dead, so far as can be learned, though death be not absolutely
26 proved yet the effect to the State is the same, there is property in its charge without a recognized owner. It must have power to meet such a case or one of its chief functions as a government must go unperformed.

The consequences of a different view are too serious to be disregarded. If an intruder enters on land of the absentee and holds open and hostile possession for twenty-one years the absentee's title will be gone. So as to personal property of which another holds or acquires wrongful possession for six years. And in the meantime how is the heir or the next of kin, who so far as can be known is the real owner, to assert his right or prevent his title from slipping away before his eyes, unless he may rely upon the presumption? Unless the State can appoint a representative of the unknown owner, whether called administrator, curator, or other name is immaterial, such owner's interests must go unprotected. And in appointing such representative the State must be allowed to act upon the presumption, for that is all that can be had in the case Unless the statute in giving such authority clearly violates rights or transgresses constitutional restrictions, it is our duty to sustain it.

The superior court held the act unconstitutional as depriving plaintiff of her property without due process of law, under the fourteenth amendment of the Constitution of the United States.
27 In so holding the court felt itself bound by the decision of the Supreme Court of the United States in Scott *v.* McNeal, 154 U. S. 34. If that case really governs the present we must of course render willing obedience to its supreme authority. But we do not so regard it. The exact point there decided was that sale by an administrator appointed under a State law for a person who had been absent, unheard of, for seven years but who was in fact alive, passed no title even to an innocent purchaser. The ground of the decision was that the probate court had no jurisdiction to appoint an administrator for a person who was alive, and there being no jurisdiction over the subject matter, the appointment of an administrator and all the acts done under such appointment were void. This is in entire accord with our own decision in Devlin *v.* Commonwealth, 101 Pa. 273, which is cited approvingly by Mr. Justice Gray in his opinion. "The estate of a person supposed to be dead is not seized or taken into custody of the court of probate upon the filing of a petition for administration but only after and under the order granting that petition; and the adjudication of that court is not upon the question whether he be living or dead, but only upon the question whether and to whom letters of administration shall issue. The local law on the subject * * * does not appear to us to warrant the conclusion that the probate court

is authorized to conclusively decide, as against a living person, that he is dead, and his estate, therefore, subject to be administered and disposed of by the probate court. On the
28 contrary, that law, in its very terms, appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate." *Id.* p. 47. "Under such a statute according to the overwhelming weight of authority as shown by the cases cited in the earlier part of this opinion, the jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called, ecclesiastical court, probate court, orphans court, or court of the ordinary or surrogate does not exist or take effect before death. All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that he is dead, and are null and void if he is alive." *Id.* 48. The cases referred to in this extract are numerous, but are founded on the same view that the essential jurisdictional fact for the action of the probate court is the death of the party whose estate is in question. This as already said is in exact conformity with our own case of Devlin *v.* Commonwealth and with it we have no question.

But our act of 1885 is wholly different in intent and effect. It was passed less than three years after the decision in Devlin *v.* Commonwealth and is an effort to supply the remedy that such a
29 state of facts as the present requires. Its primary purpose as appears from the preceding summary of its provisions, is not distribution, but conservation of the estate, through the medium of an officer clothed with authority to protect and enforce the rights of the unknown owner, the absentee if alive, his legal successor if he be dead. The statute did not create the presumption of death, that we inherited with our common law. The probate court in Pennsylvania, in the sense in which it is understood in the cases previously referred to, is, for ordinary cases, the register of wills whose jurisdiction as held in Devlin *v.* Commonwealth depends on the fact of death. But when a case arises of presumption of death from absence, a question of fact is presented, which is essential to the determination of the rights in property whose owner is thus shown to be doubtful. Express jurisdiction is given by the act of 1885 to the orphans' court to inquire into and determine judicially that fact. This provision at once takes the case out of the ruling in Scott *v.* McNeal, and the line of authorities on the same principle, and puts it in the class of Allen *v.* Dundas, 3 T. R. 125, where payment to the executor in a forged will was held good, because the appointment of the executor was a judicial act by a competent tribunal within its jurisdiction, and though incorrect in fact as subsequently shown, it was valid until regularly rescinded or reversed, and could not be attacked collaterally. The objection therefore that the court in the present case was without jurisdiction over the subject cannot be sustained

We have still to consider whether the statute is open to
30 further objection as not due process of law for want of personal service on the absentee. This depends on whether the proceedings under it are regarded as purely *in personam* or as at least quasi *in rem*. The leading authority on this point is Pennoyer *v.* Neff, 95 U. S. 714. It was there held that a general judgment against a non-resident obtained by constructive service by publication is *void and a sale under it passes no title. But it was also clearly held* that as to property within the jurisdiction of the State, judgments which are substantially directed against such property even though in form *in personam*, are valid to that extent. "It is true," says Mr. Justice Field, "that in a strict sense a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but in a larger and more general sense the terms are applied to actions between parties where the direct object is to reach and dispose of property owner by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State they are substantially proceedings *in rem* in the broader sense which we have mentioned."

The proceedings under the act of 1885 conform fully to this standard. The primary object as already said, is the due and orderly conservation of property for the benefit of the un-
31 known or uncertain owner; for the present but restricted use by those who appear to be owners, with a saving of the rights of the former owner should it subsequently appear that he is the true owner still. If the statute had provided solely for the latter alternative, and vested a public administrator or other official with authority to collect and preserve the assets for the absentee exclusively, there could be no reasonable objection by the absentee for the whole proceeding would be in his interest. Thus in the present case plaintiff has a dower interest charged on land but if she had stayed away twenty-one years it would have been lost, for the statute of limitations would have barred a recovery notwithstanding her absence during that time. But the statutory administrator has been paid part of it, and so far as appears still has it in hand or secured for her benefit. That is in aid of her right and in no sense in violation of it But there must be a limit beyond which the State is not bound to have its laws set at defiance by the whim of an individual, and property kept in abeyance as to its ownership. If a child having title to property is taken out of the State and never heard of again, it would be nearly a century before it could be said with certainty that such owner was dead. The State is not bound to have the regular and lawful use and ownership of property subject to such restrictions and uncertainty. If a fair and reasonable provision is made for protection of the

owner in case of his re-appearance the State has not exceeded
32 its constitutional powers. Such provision as already shown is made by the act, under which no distribution can be made without security for reimbursement to the owner should he be shown to be alive. And the permissive use of the income or the property itself in the meantime by those who upon the only evidence obtainable appear to be the actual present owners does not render the protection insufficient. *Temporary use is a matter clearly within* the State's power of regulation. The unreasonableness of any other view may be illustrated by the present case. Appellant has paid the charge at least in part to the administrator who has the money in hand or secured awaiting plaintiff's claim, yet the latter without resorting to that fund, or proceeding under that statute, demands that defendant shall pay a second time for a mispayment which was plaintiff's own fault.

Returning for a moment to Pennoyer *v.* Neff, there is another suggestion applicable to the authority of the State. "We do not mean to assert," says Mr. Justice Field "that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State though made without service of process or personal notice to the non-resident." And this he illustrates by the case of divorce. But if the State has power to determine in this manner the status of its citizens as to whether married or not, it surely has equal
33 power to determine the status of its citizens in respect to property, that of the absentee as to whether he is alive or dead, and that of the resident as to whether he is real owner or only next of kin.

One other consideration is applicable to the present case. The plaintiff was a citizen and resident of this State. She chose to disappear leaving no trace for eleven years. She was bound to know the law. The State has power to make rules of property, and all owners are bound to conform and abide by them. It might treat absence for seven years as *ipso facto* an abandonment, and deal with it accordingly. The plaintiff legally knew that if she stayed away twenty-one years the statute of limitations would bar her claim against the defendant, and the reasons for her absence whatever they were would not stop that result; the act of 1885 was in force when she went away and she was equally bound to know that under its provisions the presumption of death might be established and acted upon. By staying away she should be held to have accepted the provisions of the act as a sufficient protection to her rights.

Section 6 of the act, as already mentioned, deals with the subject of suits by the administrator and against him as the representative of the supposed decedent. So far as it may be held to authorize a judgment which shall have the effect of a general judgment *in personam* against him, it may be obnoxious to the constitutional objection that it is not due process of law. It will be time
34 enough to decide such questions when they arise. But even

if so much of that section may be void it will not affect the general validity of the act.

Upon this branch of the case therefore we conclude, first that the appointment of an administrator was a judicial act by a competent tribunal having jurisdiction of the subject matter, and therefore cannot be attacked collaterally, but is valid until revoked by direct proceedings as prescribed in the statute and secondly that as the proceedings are substantially *in rem*, for the conservation of property within the jurisdiction of the State, they are due process of law and the act is constitutional.

The learned judge of the common pleas did not take the same view as the superior court upon the constitutionality of the act, but he held it to be ineffective by reason of certain defects or objections. The principal of these were first, the failure to provide for a suitable bond to be given by the administrator and therefore the impossibility of exacting security from him, secondly, the absence of provision for vacation of the administration and the carrying out of the testator's directions in case a will is found, whether made before or after the grant of letters; thirdly, the absence of provision for revocation of the administration except on "proof that the supposed decedent is in fact alive, *i. e.* at the date of the application for revocation;" fourthly, the provision for refunding bonds is only on the
35 same contingency that the decedent shall in fact be alive; and lastly that the act furnishes no power or rule for adapting the practice prescribed by other general statutes *in pari materia* to the purposes of this one, or for devising new methods suitable to their accomplishment.

The difficulties thus pointed out are not insuperable, nor are any of them serious enough to invalidate the act. Where the intent of a statute is plain and its administration is committed to a court of known and established jurisdiction and methods under prior laws on similar subject matters, such court is authorized to adapt its ordinary forms to the new requirements, or to devise and employ new ones of analogous kind suitable to carrying out the intent of the act. It exercises jurisdiction over the general subject of decedent's estates, and the testamentary and administrative agents in regard to them, and has very ample chancery powers in that regard. The intent of the act of 1885 is plain. When it speaks of an administrator it means an administrator under its own provisions and the bond and security to be given by him must be such as will conform to the intent. The court has full power to so modify the the ordinary form of administrator's bond as to execute the intent of the act. Secondly, a will supersedes administration previously granted not merely because of the terms of the bond but by force of its superior authority, and there is no difficulty in applying the same
36–41 principle under this act whether the will be made before or after the letters issued, in the same way any apparent difficulty in regard to revocation, and the taking of refunding bonds before distribution is easily obviated. The language of the act is

that the court "may revoke the said letters at any time on due and satisfactory proof that the supposed decedent is in fact alive." The reasonable construction of this provision in order to carry out the plain purpose of the act is that revocation may (*i. e.* shall) be made at any time on proof that the supposed decedent is alive then, or was alive at any previous time which ought to work a revocation. Mere proof that he was alive at a subsequent date, whether a month, or a year, or more, later than the issue of letters, but had not been further heard of, might not make any such change of circumstances as to require revocation, while positive proof of his death would properly do so and lead to the issue of new letters in the ordinary course of administration. As already said none of these difficulties are insuperable, and the details may be safely left to be worked out practically as they arise. There are none of them presented in this case.

Judgment reversed and record remitted to the court of common pleas with directions to enter judgment for the defendant *non obstante veredicto*.

42 In the Superior Court of Pennsylvania.

Among the records and proceedings of the superior court of Pennsylvania, the following is thus contained:

Superior Court, October Term, 1901.

MARGARET CUNNIUS, NOW MARGARET SMITH, Plaintiff,
v.
READING SCHOOL DISTRICT, Defendant. } 48.

Walter S. Young.
C. P. 64 August term 1899.
Appeal of defendant from the judgment.
In supreme court: 351 January term 1902
Appeal from the court of *common pleas* of the county of *Berks*.
Filed February 28, 1901.
Eo die certiorari exit.
Ret'ble the second Monday of November 1901
November 11, 1901.—Record returned and filed.
Eo die assignments of error filed.
November 12, 1901.—Argued.
October 23, 1902.—Judgment affirmed.
Opinion by W. D. Porter, J.

November 7, 1902.—Remittitur exit and with record and
43–46 copy of opinion sent to the prothonotary of Berks county.

In supreme court:

November 25, 1902.—Petition for an allowance of an appeal from the superior court to the supreme court filed.
Frederick W. Nicolls, Esq.
December 22, 1902.—Appeal allowed.
Mitchell, J.

47 *Assignments of Error*

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

In the Superior Court of Pennsylvania.

MARGARET CUNNIUS, NOW MARGARET Smith,	No. 48, October Term, 1901.
v.	
READING SCHOOL DISTRICT, Appellant.	No. 19½, February Term, 1901.

Appeal by defendant from judgment of court of common pleas of Berks county.

1. The court erred in discharging the rule for judgment *non obstante veredicto*, based upon the first point reserved, which is as follows:

"Whether in view of the proceedings in the orphans' court to No. 91 January term 1897, there can be any recovery by the plaintiff in this case."

2. The court erred in charging the jury as follows:

"For present purposes, gentlemen, I instruct you to find a verdict for the plaintiff for the full amount of her claim, together with compound interest, aggregating $609.60."

3. The court erred in admitting the following offer of evidence by plaintiff:

"Mr. BIEBER: We offer in evidence the depositions of Margaret Cunnius, now Margaret Smith, the plaintiff in this case; of
48 H. S. Beals, Samuel J. Jackson, Sarah E. Lynn and J. S. Daly, taken before C. A. Elliott, Esq., commissioner, in the city of Sacramento, State of California, on the 23rd day of July, 1900, on commission and interrogatories filed in the office of the prothonotary of Berks county, August 1, 1900.

"Mr. YOUNG: For what purpose are the depositions offered?

"Mr. BIEBER: These depositions are offered for the purpose of overcoming the presumption of death raised by reason of the proceedings in the orphans' court.

"Mr. YOUNG: The offer is objected to for the reason that it is not competent for the plaintiff in this proceeding to attack the decree of the orphans' court and the action of the register in the granting of letters of administration; and further, that the evidence offered is not the best evidence of which *which* the nature of the case is susceptible."

The COURT: Admitted; exception for defendant.

"The depositions just offered in evidence were then read to the jury.)

WALTER S. YOUNG,
Counsel for Appellant.

Endorsement: Superior court of Pa. No. 48 October T. 1901. Margaret Cunnius, now Margaret Smith, *v.* Reading School District appellant. Assignments of error. Filed in the superior court Nov. 11 1901 Walter S. Young counsel for appellant.

49 *Opinion.*

In the Superior Court of Pennsylvania.

MARGARET CUNNIUS, MARGARET Smith, *v.* READING SCHOOL DISTRICT. } No. 48, October Term, 1901. Appeal from the Court of Common Pleas of Berks County.

Filed October 20, 1902.

Opinion by W. D. PORTER, *J.:*

The defendant was the owner of certain land which was subject to a right of dower of the plaintiff, the value of which dower right had been ascertained and the amount of the annual installments to be paid duly fixed. The installments had been paid down to and including that for the year 1888, to which time the domicile of the plaintiff had been in the city of Reading, in the State of Pennsylvania. The plaintiff, in the year 1888, left the State of Pennsylvania and nothing was seen or heard of her until the bringing of this action, in 1899. The only son of the plaintiff continued to reside at Reading and, on March 17th, 1897, presented his petition to the register of wills praying that letters of administration upon the estate of his mother, the plaintiff, be issued to him. The
50 ground upon which the petition for administration was founded being the presumption of the death of the plaintiff, on account of her absence for more than seven years from the place of her last domicile in this Commonwealth, the application was by the register certified to the orphans' court of the county, and the subsequent proceedings were conducted in accordance with the provisions of the act of June 24th, 1885, P. L. 155, entitled, "An act relating to the granting of letters of administration upon the estate of persons presumed to be dead by reason of long absence from their former domicile." The court after a hearing decreed that the legal presumption of death was established by the evidence. After notice by publication, in accordance with the requirements of the statute, letters of administration upon the estate of Margaret Cunnius, were January 29th, 1898, granted to John S. Gallagher. The defendant paid to this administrator all the installments upon the dower charge, and received from him an absolute release of the dower right. The plaintiff, on June 30th, 1899, brought this action to recover the annual installments accruing from her statutory right

of dower after the last payment to her, in 1888. The defendant relied upon the provisions of the act of June 24th, 1885; the decree of the orphans' court made under the jurisdiction supposed to be conferred by the act, and the payment to the administrator made in accordance with the statutory provisions. The plaintiff, under the objection of the defendant that the decree of the orphans' court
51 could not be attacked collaterally, proved that she was still living, that in the year 1888 she had acquired a domicile in the city of Sacramento, in the State of California, and had there resided ever since that time.

A verdict was taken, by consent of the parties, in favor of the plaintiff subject to the opinion of the court upon questions of law reserved, which are thus stated in the record: (1.) "Whether, in view of the proceeding in the orphans' court of the county of Berks, to No. 91 January term 1897, there can be any recovery by the plaintiff in this case." (2.) "Whether, in view of the proceedings in the orphans' court to No. 91 January term 1897, there can be any recovery in this case beyond May 16th, 1898."

The proceedings in the orphans' court for the administration of the estate of the plaintiff, upon the presumption that she was dead, were in strict accord with the provisions of the act of 1885. If the proceeding was invalid it was so because of some vice in the statute, and not because of a failure to comply with the provision thereof. The decree of the orphans' court must in any collateral proceeding be accepted as conclusive, if the parties and the subject-matter were within its jurisdiction. The attack of the plaintiff upon the decree was collateral. Her right to recover is, therefore dependent upon the constitutionality of the statute of the State of Pennsylvania, which while she was living authorized the administration of her estate, without personal notice to her, as if she were dead.
52 She invokes the protection which the fourteenth amendment to the Federal Constitution gives to the citizen against encroachment by the State; in the provision "nor shall any State deprive any person of life, liberty or property, without due process of law." This restriction upon the power of the State applies to the legislature as well as to the judicial department of its government.

It had been the practice, prior to the enactment of this statute, for the register of wills to issue letters for the administration of estates of perons who had been absent and unheard of for seven years. After an unexplained absence of seven years, the law presumed the absentee to be dead, and this presumption was as effective as direct proof of the fact; Appeal of Esterly, 109 Pa. 222. The jurisdiction of the register to grant letters was limited to the estates of the dead. The grant of letters on the estate of a person who had been absent and unheard of for seven years was founded upon the presumption of death arising from the fact, and was *prima facia* valid. This presumption was not conclisive, it might be rebutted, even in a collateral proceeding, and if the person was in fact alive the jurisdiction failed and the letters of administration were void: Devlin *v.* Com-

monwealth, 101 Pa. 273. The act of 1885 deprived the register of jurisdiction to issue letters in those cases in which the absence of the party was the only evidence of death. That legislation re-
53 quires the register to certify applications for administration of this character to the orphans' court of the county; the court is then required to advertise "the fact of said application together with notice that on a day certain the court will hear evidence concerning the alleged absence of the supposed decedent," in a newspaper published in the county once a week for four successive weeks. At the hearing the court shall hear such legal evidence as shall then be offered, for the purpose of ascertaining whether the presumption of death is established.

"SECTION 3. If satisfied upon the hearing, that the legal presumption of death is made out, the court shall so decree, and shall forthwith cause notice thereof to be inserted for two successive weeks in a newspaper published in the county, and also when practicable in a newspaper published at or near the place beyond the Commonwealth, where, when last heard from, the supposed decedent had his residence. The said notice shall require the supposed decedent, if alive, or any other person for him, to produce to the court within twelve weeks from the date of its last insertion satisfactory evidence of his continuance in life."

"SECTION 4. If, within the said period of twelve weeks, evidence satisfactory to the orphans' court of the continuance in life of the said decedent shall not be forthcoming, it shall be the duty of the court to order the register of wills to issue the letters of administration to the party entitled thereto; and said letters, until revoked, and all acts done in pursuance thereof and in reliance thereupon, shall be as valid as if the supposed decedent were really dead."

54 The fifth section enacts that the court may revoke the letters at any time, on due and satisfactory proof that the supposed decedent is in fact alive, but provides that all receipts or disbursements of assets, and all acts previously done by the administrator, shall remain as valid as if the letters were unrevoked and, further, that the act shall not validate the title of any person to any money or property received as widow, next kin or heir of such supposed decedent, "but the same may be recovered from such person in all cases in which such recovery would be had, if this act had not been passed." It will be observed that this provision of the act gives to the living person whose property has been distributed as if he were dead no remedy which he would not have possessed under preëxisting laws. Then follows this provision: "Provided further, that before any distribution of the proceeds of the estate of such supposed decedent, the persons entitled to receive the same shall respectively give sufficient real, personal security, to be approved by the orphans' court having jurisdiction, in such sum and form as the court shall direct, with condition, that if the said supposed decent shall in fact be at the time alive, they shall respectively refund the amounts received by each on demand with interest thereon; but if the person

or persons entitled to receive the same is unable to give the security aforesaid, then the money shall be put at interest, on security approved by said court, which interest is to be paid annually
55 to the person entitled to it, and the money to remain at interest until security aforesaid is given, or the orphans' court, on application, shall order it to be paid to the person or persons entitled to it."

The insufficiency of this person to secure a return of the property, or its value, to a living person whose estate has been distributed to others, is manifest. The sum and form of the security, as well as its sufficiency, is left to the discretion of the court; there is no requirement that it shall be in excess of the property distributed. The prescribed condition of the bond would require the distributees to refund, "if the said supposed decedent shall in fact be alive at the time;" that is, alive at the time of the distribution. This would leave wholly unprotected the right of the absentee to control and dispose of his property, by a sale or, in case he died after the letters of administration were issued and before the distribution, by his last will and testament. The alternative provision, in case of a failure to give the security in the first instance, is so palpably inadequate that it must tempt all persons who would become distributees under this statute to refuse to enter security, and, without entering into any undertaking to refund, receive the annual payments of interest until such time — they could induce the orphans' court to order that the principal be paid to them, without security.

A State has jurisdiction over persons and property within its boundaries, and may make a law the purpose of which is the
56 collection of abandoned estates, with proper provisions for the preservation of the property of the proceeds thereof for the owner. It has been argued that such is the purpose and effect of the statute now in question, and that it may be sustained upon that ground. The purpose and effect *to* this statute can only be determined by a consideration of all its provisions. The act authorizes the orphans' court to decree that the legal presumption of death has been made out; that decree being entered the statute makes it the duty of the court to order the register of wills to issue letters of administration; "and the said letters and all acts done in pursuance thereof and in reliance thereupon, shall be as valid as if the supposed decedent were really dead. The whole object in proceedings of administration is to ascertain who are entitled to the estate of a deceased person; to collect and dispose of the assets, and distribute the proceeds, after payment of debts, among those who come forward and prove themselves to be heirs or next of kin. The fifth section of this act leaves no doubt as to the legislative intent that such distribution should be made in the administration of estates under this statute. The sixth section makes still more clear the purpose of this law that the estate should be administered, collected, rendered liable, and distributed in precisely the same manner as if the absentees were dead. It not only contemplates the bringing of actions by the

administrator for the collection of claims due the estate, but it
57 authorizes the bringing of actions against him by which the estate may be charged. Under the provisions of this section of the statute a judgment might have been recovered against the administrator, of this living woman, without other notice than by service of the writ upon such administrator, and upon procuring a revocation of the letters of administration, the plaintiff would have become personally bound by the judgment and it would have become a lien upon her real estate, unless within three months she submitted herself to the jurisdiction of the courts of Pennsylvania and made an application to have the judgment opened, supported by an affidavit specifically alleging the existence of facts which would be a valid defence and satisfied the Pennsylvania tribunal that the facts exhibited constituted a sufficient defense to the action. The controlling factor that the jurisdiction conferred by this statute is not dependent upon the existence of property of the supposed decedent within the State of Pennsylvania or elsewhere, leaves this suggestion of appellant without foundation. The only conditions precedent to the decree are (1) that the applicant for letters of administration must be the person who would be entitled to administer in case the absentee were actually dead; and (2) that the court shall be satisfied upon the hearing that the presumption of death is made out. There is no requirement that it shall even be represented to the court, by petition or otherwise, that there is property within the State of which the absentee was the owner or in which he had
58 any interest. Whether the applicant is the person who would be entitled to letters of administration if the supposed decedent were in fact dead is determined under the provisions of the act of March 15th, 1832, section 22, P. L. 140, and is dependent on the relation in which the person stood to the decedent, and not upon the existence of property in which the latter had any right. Letters of administration might with all regularity be granted, under the provisions of this statute, upon the estate of a living person who did not own, or claim any property within the State. The only effect of such an administration might be the entry of a judgment, in an action against said administrator, which would become binding upon future acquired property of the absentee, when he subsequently attempted to set aside the proceeding of which he had had no notice. We are convinced that the purpose of this act, and its effect when carried into execution, is not to preserve property for an absent owner, but to divest his title and give it to others. When the person whose property is thus distributed is actually dead, this statute is a lawful exercise of the legislative power of the State. Do the provisions of the statute when applied to the estate of a person supposed to be dead, but who is in fact living and a citizen of another State, result in a deprivation of property without due process of law, within the prohibition of the Constitution of the United States?
The words "due process of law" mean a course of legal
59 proceedings according to those rules and principles which have been established in our systems of jurisprudence for the pro-

tection and enforcement of private rights. "To give such proceedings any validity there must be a tribunal competent by its constitution that is, by the law of its creation, to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance;" Pennoyer *v.* Neff, 95 U. S. 714. No person can be conclusively bound by the result of a judicial proceeding of which he has had no notice actual or constructive; The Lafayette Insurance Company *v.* French, 18 Howard, 408. That the publication required by the act of 1885 could not have constituted actual notice, within the meaning of the law, to the plaintiff is conclusively settled by the case of Pennoyer *v.* Neff, *supra.*

"The law assumes that property is always in the possession of its owner in person or by agent; and it proceeds upon the theory that its seizure would inform him not only of the seizure, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale." "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among
60 different owners, or, when the public is a party, to condemn and appropriate it for public use. In other words, such service may answer in all actions which are substantially proceedings *in rem.* But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in person, constructive service in this form upon a non-resident is ineffectual for any purpose." This language of Mr. Justice Field, who spoke for the Supreme Court of the United States in Pennoyer *v.* Neff, has been repeatedly approved in subsequent decisions by that court. But a decree founded upon such constructive, or substituted service by publication, bonds only the property which has been brought under the control of the court by seizure or some equivalent act, through an attachment or other appropriate writ issued in connection with the process against the owner. When the owner has not been served the jurisdiction of the court to enter a decree is only incidental to the jurisdiction which it has acquired over the property by a previous seizure. "Its jurisdiction in that respect can not be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it can not supply the doubtful position of being valid if property is found, and void if there be none."

61 Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who have noticed, either actual or by the thing condemned being first seized into the custody of the court: The Mary,

9 Cranch, 126; Hollingsworth *v.* Barber, 4 Peters 469. The statute upon which the appellant relies does not authorize a seizure of the property prior to the entry of the decree by which it is proposed to strike down the title of a living person and dispose of his property as if he were dead. The record of the orphans' court does not indicate that there was any seizure of property in this case. The proceeding was therefore not in the nature of an action *in rem*. No attempt was made to give notice to the plaintiff by a seizure of her property, either actual or constructive, until after the decree had been entered, which if valid would have deprived her of her estate in Pennsylvania. There having been no service of process upon the plaintiff, and the substituted service by publication being such as has been decided by the court of last resort as insufficient, it follows that, the orphans' court of Berks county never acquired jurisdiction over the person or the property of the plaintiff. The plaintiff had no legal notice of the proceeding by which the State of Pennsylvania undertook to divest her title to her estate and give it to others.

Mr. Justice Grey, in Scott *v.* McNeal, 154 U. S. 34, adopted the language used by Judge Choate, in Lavin *v.* The Bank, 18 62-66 Blatchford; (1) "It was not competent for a State, by a law declaring a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property and vesting it in an administrator, for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. * * * Such a statutory declaration of estoppel by a judgment to which he is neither party nor privy, which has the immediate effect of divesting him of his property, is a direct violation of this constitutional guaranty." The vice of the statute is not in the form of the decree which the court is authorized to enter, but in divesting an owner of his property by a proceeding to which he is not a party and of which he has had no notice. We are of opinion that the act of June 24, 1885, P. L. 155, in so far as it authorizes the distribution of the estate of a living citizen of the United States, domiciled in a sister State, violates the fourteenth amendment of the Constitution of the United States, and is invalid.

The judgment is affirmed.

67 *Proceedings.*

In the Orphans' Court of the County of Berks.

Estate of MARGARET CUNNIUS, Deceased. 91, January Term, 1897.

Proceedings to obtain letters of administration.

To George B. Miller, Esq., register of wills of Berks Co.:

The petition of John S. Gallagher of the township of Alsace, Berks county and State of Pennsylvania, only son of Margaret Cunnius, respectfully represents:

That his mother Margaret Gallagher became the wife of Aaron Cunnius, who died on or about the 26th of September A. D. 1881; that she was a resident of the city of Reading said county up to the first of October A. D. 1888 when she left her usual place of abode and from that time until the present a period of more than seven years she has been absent from the place of her last domicil within the Commonwealth and to this time has been unheard of by any person, the only person who is an heir of said Margaret Cunnius, maiden name Gallagher, is your petitioner, the only child.

The said Margaret has certain moneys coming to her, interest on dower amounting to about $500, and no debts so far as the same has come to the knowledge of your petitioner.

68 Your petitioner showing that he would be entitled to administration upon her estate of the said Margaret Cunnius were she in fact dead, prays the register of wills to grant him letters of administration upon the said estate in accordance with the act of assembly in such case made and provided. And he will ever pray, &c.

JOHN S. GALLAGHER.

BERKS COUNTY, *ss*:

John S. Gallagher being duly sworn according to law deposes and says that the facts set forth in the foregoing petition are correct and true to the best of his knowledge, information and belief.

JOHN S. GALLAGHER.

Sworn and subscribed before me this 13th day of March 1897.

H. S. STRUNK, *Dep. Reg.*

And now to wit March 17th 1897, the within petition having been presented to me and letters of administration having been applied for before me this day, I certify the same to the orphans' court of Berks county for such action as the court may direct according to law.

GEORGE B. MILLER, *Register.*

Now, March 20th 1897, the said application having been duly certified to this court by the register of wills of Berks
69 county and the court being satisfied that the applicant would be entitled to letters of administration upon the estate of Margaret Cunnius were she the said Margaret Cunnius in fact dead, it is ordered that the clerk of the orphans' court shall cause to be advertised once a week for four successive weeks in the Evening Telegram a newspaper published in the county of Berks, the fact of such application, together with notice that on the 4th day of May 1897, at ten o'clock a. m. the court will hear evidence concerning the alleged absence of the supposed decedent and the circumstances and duration thereof and make such decree therein as may be lawful and proper.

By the court

H. WILLIS BLAND, *P. J.*

Proof of the following publication was filed July 17, 1897.

"In the Orphans' Court of Berks County.

In the Matter of the Estate of MARGARET CUNNIUS, Who Has Been Absent from the Place of Her Last Domicil in Reading, Berks County, for Upwards of Seven Years, it Being Supposed that She is Dead.

Notice is hereby given that John S. Gallagher, the son of said Margaret Cunnius has made application to the register of wills for the grant of letters of administration to John S. Gallagher of the estate of said Margaret Cunnius, formerly Margaret Gallagher who for more than seven years has been absent and unheard of, and is believed to be dead.

70 That the said register has certified said application to the orphans' court of said county and that on Tuesday 4th day of May 1897 at ten o'clock a. m. in the court house at Reading, Berks Co., Pa., the said court will hear testimony concerning the alleged absence of the supposed decedent and the circumstances and continuance thereof."

By order of the court

GEORGE B. MILLER, *Reg. of Wills.*

And now, to wit, July 19th, 1897, due proof of publication of notice of application of John S. Gallagher the petitioner for letters of administration upon the estate of Margaret Cunnius having been made and it appearing from the legal evidence heard that said Margaret Cunnius, if living, has been absent from the place of her last domicil, to wit, in the city of Reading in the county of Berks and State of Pennsylvania and unheard from for more than seven years, it is therefore now decreed that the legal presumption of the death of said Margaret Cunnius is made out. It is further decreed

that the clerk of said court shall forthwith give notice of said decree by publication for two successive weeks in the Reading Eagle, a newspaper published in said county, requiring said Margaret Cunnius, if living or any other person for her to produce to said court on or before October 30th 1897 at ten o'clock a. m., satisfactory evidence of her continuance in life; publication of notice of said
71 decree beyond the Commonwealth of Pa. is deemed impracticeable, said Margaret Cunnius having had no known residence other than that in said city of Reading and has not since been heard from.

By the court,

H. WILLIS BLAND, *P. J.*

Proof of the following publication of notice was made.

"*Notice.*

In the Orphans' Court of Berks County, Pa.

In the Matter of the Estate of MARGARET CUNNIUS, Late of the City of Reading, said County, Whose Death is Presumed.

On July 19, 1897 it was decreed that the legal presumption of death of said Margaret Cunnius has been made out and that notice thereof be given in the Reading Eagle, a newspaper published in said county, for two successive weeks, requiring the said Margaret Cunnius if living, or any other person for her, to produce to said court on or before October 30th 1897, satisfactory evidence of her continuance in life."

By order of the court,

GEORGE B. MILLER,
Clerk of O. C.

And now, to wit, November 6, 1897 due proof of publication of notice having been made and no satisfactory evidence of the continuance in life of the said Margaret Cunnius having come
72 forth it is now therefore on motion of William M. Goodman, Esq. ordered and decreed that George B. Miller, Esq., register of wills &c., in and for said county of Berks issue letters of administration upon estate of Margaret Cunnius, late of the city of Reading in said county, the legal presumption of whose death having been made out, to the party legally entitled thereto as prayed for.

By the court.

H. WILLIS BLAND, *P. J.*

COMMONWEALTH OF PENNSYLVANIA, } ss:
Berks County, }

REGISTER'S OFFICE, *November* 23, 1903.

I, Wm. R. Kemmerer, register of wills and *ex-officio* clerk of the orphans' court for the county of Berks, in the Commonwealth of Pennsylvania, do hereby certify the foregoing to be a true and accurate copy of the original proceedings had in the orphans' court of Berks county, Penna., to # 91 January term 1897, in the estate of Margaret Cunnius, presumed to be dead. Recorded in Miscellaneous Book vol. 2, page 550, as the same remains on file and of record in this office.

In testimony whereof, I have hereunto set my hand and official seal at Reading, the date above.

[SEAL.] WM. R. KEMMERER,
Register of Wills and Ex-officio Clerk of Orphans' Court.

73 Endorsement: No. 91 Jan. T. 1897 Orphans' court of Berks Co. In the matter of the estate of Margaret Cunnius, presumed to be dead. Certified copy of proceedings. O. C. costs pd. 11/23/03

74 *Record Exemplification.*

STATE OF PENNSYLVANIA, } ss:
Berks County, }

Among the records and proceedings of the court of common pleas for the county of Berks, State of Pennsylvania, *inter alia*, it is thus contained.

Appearance Docket Entry.

August Term, 1899.

MARGARET CUNNIUS, NOW MARGARET SMITH, }
vs. } 64.
THE READING SCHOOL DISTRICT. }

Caleb J. Bieber
Frederick W. Nicolls
Summons in an action of assumpsit. Issued June 30, 1899
June 30, 1899.—Service of the within writ, together with copy of plaintiff's statement upon which suit is brought accepted by Frederick W. Nicolls, solicitor Reading School Board defendant.
June 30, 1899.—Plaintiff's statement filed.

July 17, 1899.—Defendant's suggestion of defense permitted to be filed as suggested. By the court, filed

Aug. 21, 1899.—Defendant pleads, non assumpsit and payment as per plea, filed.

75 Same day case put at issue *sec. reg.* by the prothonotary, as as per endorsement on plea.

Oct. 13, 1899.—Continued by consent.

Oct. 17, 1899.—Notice to bondsmen to come in and defend, filed.

Oct. 19, 1899.—Notice to administrator and his bondsman to come in and defend, filed.

June 26, 1900.—Interrogatories, filed. Same day parties by their attorneys agree that a commission be issued to C. A. Elliott, Esq., of the city of Sacramento, State of California, to take the testimony of witnesses on the interrogatories, &c. as per agreement, filed.

Same day commission issued to C. A. Elliott, Esq., Sacramento, Cal.

Aug. 1, 1900.—Depositions taken by C. A. Elliott, Esq., filed

And now, to wit, Sept. 27, 1900, a jury being balloted for, drawn and called came to wit: Alvin G. Miller, John Snyder, George Krick, William Hayes, William A. Nein, Adam T. Peiffer, Jacob A. Sarsaman, Michael McMahon, Nathan Fritz, Samuel Buckwalter, William A. Keller and Amos Hartman, twelve free honest lawful and judicious men of the county of Berks, who upon their solemn oaths and affirmations respectively do say the same day that

76 they find a verdict in favor of the plaintiff for six hundred and nine dollars and sixty cents ($609.60) (Verdict in box)

Oct. 1, 1900.—Motion for new trial, filed.

Same day the court grants a rule, returnable *sec. reg.*

Same day, motion for judgment *non obstante veredicto*, filed.

Same day the court grant a rule returnable *sec. reg.*

Oct. 8, 1900.—Order for stenographer to transcribe and file testimony and charge of the court, filed.

Same day, order issued.

Oct. 15, 1900.—Notes of testimony and charge of court, filed.

Oct. 23, 1900.—Rule for new trial and judgment *n. o. v.* placed on arg. list for Nov. 5, 1900 as per præcipe, filed.

Same day proof of service of notice filed.

Nov. 5, 1900.—Continued.

Dec. 26, 1900.—Rule for judgment *non obstante veredicto*, placed on the argument list for Jan. T. 1901, as per præcipe, filed.

Same day acceptance of service of notice filed.

Jan. 7, 1901.—Argued C. A. V. (A. L. J.)

And now Feb. 9 1901, the rule for judgment *n. o. v.* is dis-

77 charged, and the rule for new trial is discharged on condition that the plaintiff or her counsel, within 30 days from this date, remit upon the record of this suit so much of the verdict heretofore rendered therein, as exceeds the sum of $410.04 otherwise upon the expiration of said period, said rule to be absolute as per opinion, filed.

And now, to wit: February 11, 1901 in pursuance of the order of court made in the opinion filed in this case Feb'y 9, 1901, the plaintiff by her counsel, Caleb J. Bieber hereby remits upon the record of this suit so much of the verdict as exceeds the sum of $410.04 as per paper, filed.

Feb. 18, 1901.—Verdict fee paid to the sheriff of Berks county by plaintiff as per receipt shown.

Same day judgment entered on reduced verdict of $410.04 with interest from Sept. 27, 1900. See No. 19½ February term 1901. J. D.

March 1, 1901.—Bond on appeal to the superior court of Pennsylvania by the defendant with J. E. Wanner as surety, in the sum of one thousand dollars, filed.

Recorded in Bail Bond Docket vol. 5, page 385.

Same day received certiorari from the superior court of Penna.

Returnable the second Monday of November 1901, with acceptance of service endorsed.

78 Oct. 28, 1902.—Record certified to the superior court.

Nov. 8, 1902.—Remittitur filed "And it was so proceeded in our said superior court that the following judgment was made to wit: Judgment affirmed.

Same day record copy of opinion returned and filed.

Dec. 29, 1902.—Received certiorari from the supreme court, returnable the first Monday of March 1903, with acceptance of service of rule endorsed.

July 17, 1903.—Remittitur filed and it was proceeded in our said supreme court that the following judgment was made to wit: Judgment reversed and the record remitted to the court of common pleas with direction to enter judgment for the defendant *non obstante veredicto*. Same day judgment entered for defendant *non obstante veredicto* in accordance with the judgment of the supreme court. Entered to No. 117½ June term 1903, J. D.

STATE OF PENNSYLVANIA, } ss:
Berks County, }

Among the records and proceedings of the court of common pleas for the county of Berks, State of Pennsylvania, *inter alia*, it is thus contained:

Appearance Docket Entry.

August Term, 1899.

MARGARET CUNNIUS, NOW MARGARET SMITH,
v.
THE READING SCHOOL DISTRICT. } 64.

Caleb J. Bieber.
Walter S. Young.
Summons in an action of assumpsit. Issued June 30, 1899.
June 30, 1899.—Service of the within writ together with a copy of plaintiff's statement upon which this suit is brought accepted
79 by Frederick W. Nicolls, solicitor Reading School Board, defendant.
June 30, 1899.—Plaintiff's statement, filed.
July 17, 1899.—Defendant's suggestion of defense permitted to be filed as suggested, by the court, filed.
Aug. 21, 1899.—Defendant pleads non assumpsit and payment, as per plea, filed.
Same day case put at issue, *sec. reg.* by the prothonotary as per endorsement on plea.
Oct. 13, 1899.—Continued by consent.
Oct. 17, 1899.—Notice to bondsmen to come in and defend, filed.
Oct. 19, 1899.—Notice to administrator and his bondsmen to come in and defend filed.
June 26, 1900.—Interrogatories filed, Same day parties by their attorneys agree that a commission be issued to C. A. Elliott, Esq., of the city of Sacramento, State of California, to take the testimony of witnesses on the interrogatories, &c. as per agreement, filed.
Same day, commission issued to C. A. Elliott, Esq., Sacramento, Cal.
Aug. 1, 1900.—Depositions taken by C. A. Elliott, Esq., filed.
And now, to wit, Sept. 27, 1900, a jury being balloted for,
80 drawn and called, came to wit Alvin G. Miller John Snyder, George Krick, William Hayes, William A. Nein, Adam T. Peiffer, Jacob A. Sarsaman, Michael McMahon, Nathan Fritz, Samuel Buckwalter, William A. Keller and Amos Hartman, twelve free, honest, lawful and judicious men of the county of Berks who upon their solemn oaths and affirmations respectively do say the same day that they find a verdict in favor of the plaintiff for six hundred and nine dollars and sixty cents ($609.60) (Verdict in box)
Oct. 1, 1900.—Motion for new trial filed. Same day the court grant a rule returnable *sec. reg.*
Same day motion for judgment *non obstante veredicto* filed.
Same day the court grant a rule returnable *sec. reg.*
Oct. 8, 1900.—Order for stenographer to transcribe and file testimony and charge of the court, filed. Same day order issued.

Oct. 15, 1900.—Notes of testimony and charge of the court, filed.

Oct. 23, 1900.—Rule for new trial and judgment *n. o. v.* placed on arg. list for Nov. 5, 1900 as per præcipe, filed. Same day proof of service of notice, filed.

Nov. 5, 1900.—Continued.

Dec. 26, 1900.—Rule for judgment *non obstante veredicto*,
81 placed on the argument list for Jan. 7, 1901, as per præcipe, filed.

Same day acceptance of service of notice, filed.

Jan. 7, 1901.—Argued, C. A. V. (A. L. J.)

And now, Feb. 9, 1901, the rule for judgment *n. o. v.* is discharged, and the rule for new trial, is discharged on condition that the plaintiff or her counsel within 30 days from this date, remit upon the record of this suit so much of the verdict heretofore rendered thereon as exceeds the sum of $410.04, otherwise upon the expiration of said period, said rule to be absolute, as per opinion filed.

And now, to wit: February 11, 1901, in pursuance of the order of court made in the opinion filed in this case Feb. 9, 1901, the plaintiff by her counsel Caleb J. Bieber hereby remits upon the record of this suit so much of the verdict as exceeds the sum of $410.04 as per paper filed.

Feb. 18, 1901.—Verdict fee paid to the sheriff of Berks county by plaintiff as per receipt shown. Same day judgment entered on reduced verdict for $410.04 with interest from Sept. 27, 1900, See No. 19½ February term 1901, J. D.

March 1, 1901.—Bond on appeal to the superior court of Penna. by the defendant with J. E. Wanner as surety in the sum of one thousand dollars filed. Recorded in Bail Bond Docket, vol. 5, page 385

82–84 Same day receiver certiorari from the superior court of Penna.

Returnable the second Monday of November, 1901, with acceptance of service endorsed.

Judgment Docket Entry.

September Term, 1900.

MARGARET CUNNIUS, NOW MARGARET SMITH,
v.
THE READING SCHOOL DISTRICT. } 80.

64 August term 1899.

Sept. 27, 1900.—Verdict in favor of plaintiff for the sum of $609.60.

February Term, 1901.

MARGARET CUNNIUS, NOW MARGARET SMITH,
v.
THE READING SCHOOL DISTRICT. } 19½.

64 August term 1899.

February 18, 1901.—Judgment entered on reduced verdict in favor of plaintiff for the sum of $410.04 with interest from Sept. 27, 1900.

85 *Plaintiff's Statement.*

In the Court of Common Pleas of Berks County.

MARGARET CUNNIUS, NOW MARGARET SMITH,
v.
THE READING SCHOOL DISTRICT. } No. 64, August Term, A. D. 1899. Action of Assumpsit.

Plaintiff's statement.

The plaintiff, Margaret Cunnius, now Margaret Smith, claims of the defendant, The Reading School District, the sum of four hundred and five dollars and ninety-four cents ($405.94), which is justly due and payable to the plaintiff by the defendant upon the following cause of action:

Under inquisition proceedings sur estate of Catherine Cunnius, deceased, instituted in the orphans' court of Berks county State of Pennsylvania, there was allotted to John M. Cunnius, April 1st 1882, a tract of land situated at the south east corner of 8th and Washington streets in the city of Reading aforesaid and by an orphans' court decree entered at the same time, there was charged upon said tract of land a dower principal in favor of Mar-
86 garet Cunnius, the defendant, widow of Aaron Cunnius, deceased, amounting to $759.61, the interest whereof was in pursuance of said decree to be paid annually to the said Margaret Cunnius, during her natural life. Said inquisition proceedings are recorded in the orphans' court office of Berks county, in real estate docket, vol. 27, p. 785.

On September 25 1882, the said John M. Cunnius by indenture recorded in the recorder's office of Berks county, in Deed Book vol. 145 p. 150, conveyed part of the said tract of land described in the above mentioned inquisition proceedings, to The Reading School District, the defendant aforesaid, in which indenture the portion of said dower principal fixed in favor of the plaintiff on the premises so conveyed to the defendant, is $569.61.

The annual legal interest on the said dower charge of $569.61 has not been paid to the plaintiff, by the defendant since the 1st day of

April A. D. 1888, and there is consequently due and owing to the plaintiff by the said defendant the sum of $405.94. Wherefore the plaintiff brings this suit.

CALEB J. BIEBER,
Att'y for Plaintiff.

Reference to Record on Which Suit is Brought.

Real estate docket in the orphans' court office of Berks county, vol. 27, p. 785.

Deed Book, vol. 145, p. 150, in the recorder's office of Berks
87–92 county.

CALEB J. BIEBER,
Att'y for Plaintiff.

Endorsement: No. 64 August term 1899? Margaret Cunnius, now Margaret Smith, *v.* The Reading School District? Plaintiff's statement Filed June 30, 1899, at 11.30 a. m. Caleb J. Bieber att'y for pl'f.

* * * * * * *

93 *Notes of Testimony and Charge of Court.*

In the Court of C. P. of Berks Co.

MARGARET CUNNIUS, NOW MARGARET SMITH, *v.* READING SCHOOL DISTRICT. } No. 64, Aug. T., 1899. Assumpsit.

Before Hon. G. A. Endlich, J., and a jury.

Appearances.

Plaintiff: Caleb J. Bieber, Esq.
Defendant: Walter S. Young, Esq.

* * * * * * *

94 *Plaintiff's Evidence.*

Mr. BIEBER: We offer in evidence the inquisition proceeding sur real estate of Catharine Cunnius, dec'd., recorded in the register's office of Berks county, Real Estate Book, vol. 27, p. 785.

We offer in evidence deed of John M. Cunnius and wife to the Reading school district, dated Sept. 25, 1882, recorded in Deed Book vol. 145, p. 150, in the recorder's office of Berks county, in which this clause is contained: "Subject, however, to the right of dower therein of Margaret Cunnius, widow of Aaron Cunnius, amounting

to the sum of five hundred and sixty-nine and 61/100 dollars ($569.61), remaining as a charge thereon."

We admit payment upon this dower of the interest to Apr. 1, 1888.

Plaintiff rests.

Defendant's Evidence.

(Mr. Young stated the case for the defendant.)

95 Mr. YOUNG: The defendant offers in evidence proceedings in the orphans' court of Berks county, to No. 91 Jan. T. 1897, recorded in vol. 2, p. 550. This is for the purpose of offering the decree of the orphans' court of Berks county declaring Margaret Cunnius legally dead and directing the register of wills to grant letters of administration upon her estate in accordance with the provisions of the act of 1885.

Mr. BIEBER: Objected to, because it is inadmissible on the ground that the act of 1885 is unconstitutional and that the proceedings are void and that the register has no jurisdiction to appoint an administrator of the estate of a person who is alive.

The COURT: Admitted; exception for plaintiff.

Mr. YOUNG: We offer in evidence letters of administration on the estate of Margaret Cunnius, dec'd., to John S. Gallagher dated Jan. 29, 1898.

We offer in evidence the release of John S. Gallagher, administrator of the estate of Margaret Cunnius, late of the city of Reading, Pa., dec'd., to the Reading school district, whereby he remises, quit claims and forever discharges the real estate hereinbefore more fully mentioned and described, of and from the interest on the said dower or thirds, and of and from all actions, suits, payments, ac-

96 counts, reckonings, claims and demands whatsoever for or by reason thereof; dated the 16" day of May, 1898; recorded in Misc. Book 49, p. 213.

Mr. BIEBER: We object to the admission of this release on the ground that payment to the administrator is not a defence to an action by the supposed decedent afterwards.

Defendant rests.

Plaintiff's Evidence in Rebuttal.

Mr. BIEBER: We offer in evidence the depositions of Margaret Cunnius, now Margaret Smith, the plaintiff in this case; of H. S. Beals, Samuel J. Jackson, Sarah E. Lynn, and J. S. Daly, taken before C. A. Elliott, Esq., commissioner, in the city of Sacramento, State of California, on the 23rd day of July 1900, on commission and interrogatories filed in the office of the prothonotary of Berks county Aug. 1, 1900.

Mr. YOUNG: For what purpose are the depositions offered?

Mr. BIEBER: These depositions are offered for the purpose of overcoming the presumption of death raised by reason of the proceedings in the orphans' court.

Mr. YOUNG: The offer is objected to, for the reason that it is not competent for the plaintiff in this proceeding to attack the
97 decree of the orphans' court and the action of the register in the granting of letters of administration; and further, that the evidence offered is not the best evidence of which the nature of the case is susceptible.

The COURT: Admitted; exception for defendant.

(Defendant, The School District, admits that the depositions are sufficient to identify Margaret Cunnius the plaintiff and prove her to be alive; therefore they are omitted from the record.)

Reserved Points.

The following points are reserved by the court:—

1. Whether, in view of the proceedings in the orphans' court to No. 91 Jan. T. 1897, there can be any recovery by the plaintiff in this case.

2. Whether, in view of the proceedings in the orphans' court to No. 91 Jan. T. 1897, there can be any recovery in this case beyond May 16, 1898.

3. Whether in this case, if the plaintiff is entitled to recover, she can recover more than the arrearages with simple interest.

98 *Charge of the Court.*

Judge Endlich charged the jury as follows:

GENTLEMEN OF THE JURY: The only question that would be open for submission to the jury in this case, for present purposes, is the question of the identity of the plaintiff in this case with the Margaret Cunnius who she claims to be. The evidence has been given, and the defendant's counsel very properly agrees that there is no question for submission to the jury, but that the jury would not be warranted in finding that the plaintiff is anybody but the person she claims to be; he therefore agrees that the jury shall render a verdict in this case for the plaintiff, which verdict will be subject to certain legal questions that we have not time to argue and dispose of now. Moreover, this verdict will be taken for the amount of the arrearages together with compound interest, and we will determine further on whether that is more than she is entitled to or not. For present purposes, gentlemen, I instruct you to find a verdict for the plaintiff for the full amount of her claim, together with compound interest, aggregating $609.60.

(Exception noted for defendant to charge of court.)

(Before verdict, counsel for defendant requests the court to
99 direct the stenographer to transcribe his notes of testimony and charge of the court in the case, and file the same of record.)

The foregoing notes of testimony and charge with the exceptions taken by counsel have been examined by me and are hereby approved and ordered to be filed.

G. A. ENDLICH, *Judge.*

Endorsement: No. 64 Aug. term 1899. C. P. Berks county. Margaret Cunnius now Margaret Smith *v.* Reading School District. Stenographer's transcript Notes of testimony and charge of court. Filed Oct. 15, 1900 at 2.05 p. m.

In the Court of Common Pleas of Berks County.

MARGARET CUNNIUS, NOW MARGARET SMITH, *v.* THE READING SCHOOL DST. } No. 64, August Term, 1899.

And now, to wit: October 1, 1900, the defendant, by its counsel Walter S. Young, moves the court for a rule to show cause why a new trial should not be granted, and in support of said motion filed the following reasons:

100 I. The court erred in admitting the depositions of Margaret Smith, plaintiff, and others, for the purpose of proving that the plaintiff is living.

II. The court erred in admitting the depositions of Margaret Smith, plaintiff, and others, for the purpose of attacking collaterally the decree of the orphans' court of Berks county in the proceeding to No. 91 January term, 1897.

III. The jury erroneously allowed compound interest on plaintiff's claim.

WALTER S. YOUNG,
Att'y for Defendant.

Endorsement: No. 64 Aug. T. 1899. Margaret Cunnius *v.* The Reading School Dst. Filed Oct. 1, 1900 at 10 a. m. And now to wit: Oct. 1, 1900, on motion of counsel for defendant, rule granted to show cause why a new trial should not be awarded, returnable *sec. reg. Per Curiam:* G. A. Endlich, judge. Filed Oct. 1, 1900, at 10/10 a. m. Walter S. Young, att'y for d'f't.

In the Court of Common Pleas of Berks Co.

MARGARET CUNNIUS, NOW MARGARET Smith, *v.* THE READING SCHOOL DST. } No. 64, August Term, 1899.

101–105 And now, to wit: October 1, 1900, the defendant, by its attorney Walter S. Young, moves the court for judgment in its favor upon the points reserved *non obstante veredicto.*

WALTER S. YOUNG,
Att'y for Defendant.

Endorsement: No. 64 Aug. T. 1899. Margaret Cunnius *v.* The Reading School District. Filed Oct. 1, 1900 at 10 a. m. And now, October 1, 1900, on motion of defendant's counsel, rule granted to show cause why judgment should not be entered in favor of defendant, *non obstante veredicto.* Returnable *sec. reg. Per curiam:* G. A. Endlich, judge. Filed Oct. 1, 1900. Walter S. Young, att'y for d'f't.

* * * * * * *

106 *Opinion.*

Court of C. P. of Berks Co.

CUNNIUS *v.* READING SCHOOL DISTRICT. } No. 64, Aug. T., 1899.

Rule for new trial and judgment *n. o. v.*

There is no rule of law which requires a party to a civil proceeding to be present at the trial thereof. As a witness such party
107 seems clearly comprehended by sec. 8, act 23 May 1887 P. L. 158, 161, which declares that the testimony of any competent witness may be taken by commission or deposition. A photograph, properly proven, is an accepted means of identification: Udderzook *v.* Com. 76 Pa. 340; Beardslee *v.* Columbia Tp. 188 *id.* 496. In a case like this, where the plaintiff lives in California, and for that reason does not appear at the trial, neither her testimony by deposition nor the production of her photograph is objectionable as secondary evidence. The rule excluding such does not mean that everything is secondary which is not of the highest grade of proof, but only that which discloses the existence of other evidence whose non-production may be supposed to be on the ground that, if produced, it would work against the party offering it: Shoenberger's Ex'rs *v.* Hackman, 37 Pa. 87, 93. The circumstances of this case exclude such a sugges-

tion. These propositions dispose of all the questions here raised except those covered by the points reserved. Most prominent among them is that which concerns the validity and effect of the act 24 June 1885, P. L. 155. It was this statute under which, upon proceedings in the orphans' court of this county, to No. 91 Jan. T. 1897, a decree was made declaring the presumption of plaintiff's death to be established, and letters of administration issued upon her estate, and under which defendant, having paid to the administrator the dower interest now demanded by plaintiff, claims to be exempt from liability for the same and from any suit by her.

108 The argument of the learned counsel for plaintiff, contending that this statute offends against the 14th amendment of the Constitution of the United States, is founded upon a large number of decisions, with which only two cases (Roderigas *v.* Sav. Inst'n, 63 N. Y., 460, and Plume *v.* Sav. Inst'n, 46 N. J. L., 211) are in conflict,—which it is unnecessary to review in detail,—and of the collective doctrine of which Devlin *v.* Com., 101 Pa., 273, Scott *v.* McNeal, 154 U. S., 34, and Carr *v.* Brown, (R. I.), 38 Atl. R., 9, may be taken as fairly expressive. The sum and substance of them may be stated as follows:

1. A tribunal whose jurisdiction over property depends upon the death of its owner cannot, by virtue of its constitution or of its inherent powers, obtain control over property whose owner is not in fact dead.

2. Such tribunal, for the purpose of acquiring jurisdiction, is incapable of declaring the fact of the owner's death with the effect of precluding proof to the contrary in his behalf, either directly on application to vacate the action of the tribunal, or collaterally in any proceeding involving its validity.

3. Where jurisdiction is by law conferred upon a tribunal over estates of absent persons who may or may not be actually dead,

109 the requirement of due process of law demands, that, before any one's property be handed over to third parties, with the effect of depriving him of it or of control over it, temporarily or permanently, he should have lawful notice and an opportunity of being heard.

4. If the jurisdiction thus conferred upon the tribunal over derelict property is to be exercised upon a finding by it that the owner is dead, the proceeding resulting in such decree is not a proceeding *in rem*, in any proper sense, and personal notice must, if the owner be living, be served upon him in order to bind him, and such service cannot be effectively made beyond the State.

5. But if the jurisdiction of the tribunal, under the law conferring it, attaches to property by virtue of the fact that its owner has been absent and unheard from for any prescribed period, regardlessly of the question whether he is alive or dead the property is at once brought within the grasp of the tribunal by the existence of that jurisdictional fact, and the entire proceeding is substantially a proceeding *in rem* (*i. e.*, one whose direct object is not to determine any

personal rights or obligations, or impose any personal liabilities, but to reach and dispose of property or some interest therein: Pennoyer *v.* Neff 95 U. S. 714; Steel *v.* Smith, 7 W. & S. 447; Coleman's App., 75 Pa. 441) in which substituted service of publication may be sufficient (Pennoyer *v.* Neff, *supra*).

110 It is, of course, not the teaching of the decisions referred to, nor can it be successfully maintained, that the State may not make a law for taking care of abandoned estates, with proper notice to the absent or unknown owners. The contrary is distinctly asserted in Lavin *v.* Sav. Bk., 1 Fed. R. 641, 675, and clearly recognized in the opinion of Mr. Justice Gray in Scott *v.* McNeal, *supra*, when he approvingly refers to a Louisiana statute whose "main object * * * is to take possession of and preserve the property for the absent owner, not to deprive him of it upon an assumption that he is dead." Comparing our act of 1885 with this Louisiana enactment, the close similarity between them in the general scheme and purpose as well as in many of the detailed provisions is strikingly manifest. Whether the person put in charge of apparently abandoned property be called an administrator or a curator (as in Louisiana) is quite insignificant, as is also the merely formal matter of the mode of his appointment,—whether by letters granted at the command of a court of competent jurisdiction by an officer required to act as in this instance subordinate to it, or by commission issued directly by it. The material inquiry from the standpoint of constitutional law concerns, not the nomenclature adopted, but the purpose to be effected by the statute. Now, the very title of the act of 1885 describes it as relating to the grant of letters of administration upon the estate of a person simply presumed to be dead, and throughout, it neither aims at the as-

111 certainment of the fact of his death nor bases the jurisdiction or powers conferred upon any theory or finding that he is dead On the contrary, it assumes that he may be living, and that the register, by virtue of his authority to grant letters upon the estates of dead men only, has no authority to act as of his own proper jurisdiction. Accordingly it requires him to certify the application to the orphans' court and provides for a hearing by that court, upon notice, not only to the next of kin of the absentee, but generally to all persons. Moreover, it refers to the court as the subject-matter of that hearing the question, not whether the party is in fact alive or dead, but whether there is enough in the circumstances of his absence to raise a presumption of his death. The adjudication can go no further than that. It cannot undertake to declare the party dead. It can simply ascertain that he has been away and unheard from for so long and under such circumstances that a legal presumption of his death has arisen, no matter whether in fact he be alive or dead. That it does not mean and is not intended to have the effect of a finding that he is dead, is clear from the requirement that it be followed by a second notice distinctly to the absentee, only upon the expiration of which

without his appearing an order is to be made by the court directing the register to issue letters to the "party entitled," *i. e.*, by reference to the first section of the act, to the party who "would be entitled thereto were the supposed decedent in fact
112 dead." The statute declares that all acts done in pursuance of the grant of such letters and in reliance thereupon "shall be as valid as if the supposed decedent were really dead." But, as the functions of an administrator are to gather in, manage and preserve the personal estate committed to his care, the effect of this declaration is simply to protect him in the discharge of those duties and those dealing with him as the lawful recipient and custodian of the personalty belonging to the absentee. The implication of any intended further effect is immediately excluded by the provision that the orphans' court may (which, of course, means "must") revoke the letters at any time on proof that the absentee is alive,—that upon such revocation the functions of the administrator are to cease, and he shall settle (of course, in the orphans' court) an account of his administration to the date of its revocation, and make transfer of the assets in his hands,—that no person who has received any money or property as widow, heir or next of kin of the absentee shall retain it against him,—and that, before any distribution of the estate shall be made to such, security must be furnished to refund, with interest, if the party be alive, otherwise the money to be invested under the direction of the court and remain at interest until, after an absence of the party sufficiently prolonged to justify the court in doing so (see Morrison's Est. 183 Pa. 155), the same may order payment over without security. Finally, the statute arranged for the substitution of the party,
113 after revocation, as plaintiff or defendant in actions to which the administrator was either, the opening and review of judgments against the latter at the instance of the former, and the payment of the costs attending the issuing or refusal of letters applied for under the act, etc. In a word, the entire scheme and purpose is to provide a method for taking charge of and administering estates whose owners, alive or dead, appear to have abandoned them, but may turn up to reclaim them, and to preserve the corpus of them against that day, subject to such reasonable use as ought and legitimately may be made of them in the meanwhile. With this object in view, the act meets the difficulty pointed out in Devlin *v.* Com., *supra*, at p. 276, (that the original constitution of the orphans' court, as shown in McPherson *v.* Cunliff, 11 S. & R. 422, 410, made its jurisdiction over property dependent upon the death of its owner,) by conferring upon it jurisdiction also over estates of absentees, whether living or dead, as to whom a presumption of death has arisen. There is surely nothing in the way of such an enlargement of the jurisdiction of that court, and the effect must necessarily be the same as if the jurisdiction thus conferred existed by the law of its original creation. And property thus situated being brought within the grasp of the orphans' court, placed under its con-

trol and into its custody, by the very fact that it is so situated, the proceeding prescribed is essentially a proceeding *in rem* and the notice directed to be given a sufficient one. In this connection it may be proper to indicate what seem to be radical distinctions between this act and the Rhode Island statute declared unconstitutional in Carr *v.* Brown, *supra*, upon which decision plaintiff's counsel very justly lays considerable stress because of the similarity in some important particulars between the two enactments. Unlike that of 1885, the Rhode Island statute does not provide for any notice or summons whatever to the absentee, but only to his "relations and heirs," provides for a final distribution of the property at the expiration of three years, without any thought of securing a return of it, should the absentee thereafter turn up, beyond such balance as shall still remain in the administrator's hands, and permits in the first instance, not merely the appointment of an administrator, but the probate of a "last will and testament" left by the absentee, which, to be sure, is an absurdity is he is still living or supposed to be living and necessarily implies that the statute means to treat him as a dead man.

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But the trouble about the act of 1885 does not end when it is ascertained that its purpose and the provisions for notice of the proceeding ordained by it are not in conflict with jurisdictional and constitutional limitations. A statute, in order to be valid, must not only mean to accomplish a constitutional purpose in a constitutional way, but its provisions must be such as to be capable, in their operation, of effecting the manifest object of its passage. Where they are such as, if made operative, would violate the manifest intent of the legislature, the statute cannot be given any operation: Farmers' B'k *v.* Hale, 59 N. Y. 53,—and so where the mode prescribed for attaining the purpose of a statute is so insufficient that its defects cannot with propriety and effect be supplied by and in accordance with the practice of the tribunal to which jurisdiction is given: Hughes' case, 1 Bland (Md.) 46,—or, where it furnishes no power to warrant and no rule to guide such tribunal in devising new forms and methods for effectuating the intent of the enactment, and an attempt on its part to do so would necessarily involve a conflict with positive directions of general statutes in *pari materia:* Com. *v.* Martin, 6 Distr. R. 645; Com. *v.* McCormick, 8 *Id.* 117.

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The main object of the act of 1885, as has been seen, is to provide for temporary or provisional management and for the preservation of absentees' estates. It is very clear, that, in order to make the intent of preserving the estate effective, it is indispensable that something like the usual duties of administrators,—the giving of security, liability to account, subjection to the control of the orphans' court, etc.,—must be exacted. Doubtless the act of 1885 contemplates the giving of an administration bond. But it is also clear, that, when the terms "administrator," "administration," are used in this statute, they are not used in any ordinary sense. The bond exacted from administrators generally will not fit the case of

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an administrator under the act of 1885 in view of the contingency of the absentee's turning up alive. Yet that is the bond which, by law, all administrators are obliged to give, and the only bond that can be required; nor is there any authority given in this statute to the register or the orphans' court to dispense with it or so to modify it as to make it a suitable security. The result is that the act makes the exaction of any security from the administrator impossible, and thus tends to defeat its own purposes. Again, in order not to work a deprivation of property, which would be contrary to those purposes, there must be some way indicated, or at least left open, for a vacation of the administration and an appropriation of the property to objects appointed by its owner by last will and testament, whether made before or after the grant of letters. The right to control and dispose of one's property is the right of property itself: Hutchinson *v.* Schimmelfeder, 40 Pa. 396, 398, and when it comes to the question whether a statute takes away a man's property, "no just distinction can be made between the owner's * * * abstract right of property and those incidents * * * which constitute the value and ownership": Lavin *v.* Sav. B'k, *supra*, p. 656. The bond of an administrator in the prescribed form stipulates for a surrender of the letters of administration in the single case, of course, of the production and proof of a
117 will made before their grant. Assuming that bond to be part of the act of 1885, there would still be no provision for the case of a will made by the absentee after the grant of administration Nor, indeed, is there any power given by that statute to revoke the same, except "at any time * * * on * * * proof that the supposed decedent is in fact alive,"—*i. e.*, at the date of the application for revocation. And so, upon distribution, the refunding bonds are to be conditioned for a return of the distributive shares if their owner "shall in fact be at the time alive." *Expressio unius est exclusio alterius.* The contingency of a will turning up after grant of administration under the act of 1885 is wholly ignored in its provisions. In short, in the particulars pointed out and others which it is needless to elaborate, those provisions, if carried out as ordained, are bound to frustrate the purpose for which mainly the act was passed, while furnishing to the orphans' court no power or rule for adapting the practice prescribed by other general statutes *in pari materia* (remaining unrepealed) to the purposes of this one, or for devising new methods suitable to their accomplishment.

It follows, under the authorities above cited, that the act of 1885 must be held void, and that the defense in this case can derive no support from anything done under or in reliance upon it.

The only remaining question concerns the allowance in the verdict of interest upon the instalments annually payable to the plaintiff in lieu of dower. The general rule is laid down in
118 Stewart *v.* Martin, 2 W., 200; Knettle *v.* Crouse, 6 *id.*, 123; Beaver Co. *v.* Armstrong, 44 Pa., 63, 74, that interest is recoverable except where the circumstances give rise to a presump-

tion that it was not intended to be claimed. It would seem that the case of a woman absenting herself for so many years, unheard from, should afford a ground for such a presumption. Moreover, interest is said to be "a compensation allowed to the creditor for delay of payment by the debtor," "impliedly due whenever a liquidated sum of money is unjustly withheld," "a legal and uniform rate of damages allowed in the absence of any express contract, when payment is withheld after it has become the duty of the debtor to discharge his debt": Kelsey *v.* Murphy, 30 Pa., 340, 341; Minard *v.* Beans, 64 *id.*, 411, 413. Under the circumstances of this case, there certainly was no wrongful withholding of the money from her up to the time when she demanded it. She herself made it impossible for her debtor to pay it, and thereby ought to be deemed to have waived the right to demand interest on the several instalments from the time they fell due. Nor could she recover any part of an instalment not yet payable, the last instalment capable of being included in the recovery being that due Apr. 1, 1900.

The rule to show cause why judgment should not be entered for defendant must, after what has been said, be discharged. The necessity for making absolute the rule for a new trial because of the excessive recovery may be avoided by a remission of the interest.

119–129 And now, Feb. 9, 1901, the rule for judgment *n. o. v.* is discharged, and the rule for a new trial is discharged on condition that the plaintiff or her counsel, within 30 days from this date, remit upon the record of this suit so much of the verdict heretofore rendered therein as exceeds the sum of $410.04; otherwise, upon the expiration of said period, said rule to be absolute.

By the court:—

G. A. ENDLICH, *Judge.*

Def't excepts to the discharge of the rule for judgment *non obstante veredicto;* whereupon bill sealed.

G. A. ENDLISH, *Judge.* [SEAL.]

Endorsement: C. P. No. 64 Aug. T. 1899. Cunnius *v.* Rdg. School Dist. Opinion Filed Feb. 9, 1901 at 10 a. m. Young Bieber.

130 In the Supreme Court of the United States, October Term, 1903.

MARGARET CUNNIUS, NOW MARGARET SMITH, Plaintiff in Error and Plaintiff Below,
vs.
THE READING SCHOOL DISTRICT, Defendant in Error and Defendant Below.
} No. 529.

Statement of Errors and Parts of the Record Which the Plaintiff in Error Thinks Necessary for the Consideration Thereof.

131 In the Matter of the Appeal of MARGARET CUNNIUS, Now MARGARET SMITH, form the Judgment of the Supreme Court of Pennsylvania, Filed July 9, 1903, in the Case in Which the Said MARGARET SMITH is Plaintiff in Error and Plaintiff Below and THE READING SCHOOL DISTRICT is Defendant in Error and Defendant Below.

In the Supreme Court of the United States.

Assignment of Errors.

1. The supreme court of Pennsylvania erred, in its opinion filed July 9, 1903, in deciding that the proceedings instituted under and by virtue of the act of the General Assembly of the State of Pennsylvania, approved June 24, 1885, P. L. 155, which proceedings resulted in the appointment of an administrator of the estate of Margaret Cunnius, plaintiff in error, constituted "due process of law" within the meaning of the 14th amendment of the Constitution of the United States, the said Margaret Cunnius, having, at the time of the institution of said proceedings and the appointment of an administrator thereunder, been a living, non-appearing non-resident, without legal notice of said proceedings. These proceedings were had to No. 91 January term, 1897, orphans' court of Berks county.

2. The said supreme court of Pennsylvania further erred in deciding that the appointment of the administrator under the aforesaid proceedings was not open to collateral attack by the said Margaret Cunnius, the plaintiff and appellant.

3. The said supreme court of Pennsylvania also erred in deciding that the said act of 1885, as against Margaret Cunnius the plaintiff in error and appellant, was constitutional, and therefore not in conflict with the 14th amendment of the Federal Constitution.

132 The following is an abstract from the opinion of the supreme court of Pennsylvania on which the above assignments of error are founded:

"Upon this branch of the case therefore we conclude, first that the appointment of an administrator was a judicial act by a com-

petent tribunal having jurisdiction of the subject matter, and therefore cannot be attacked collaterally, but is valid until revoked by direct proceedings as prescribed in the statute. And secondly that as the proceedings are substantially *in rem*, for the conservation of property within the jurisdiction of the State, they are due process of law and the act is constitutional."

4. The supreme court of Pennsylvania erred in reversing the judgment of the superior court of Pennsylvania affirming judgment of the court of common pleas of Berks county, State aforesaid, and directing judgment to be entered for the defendant *non obstante veredicto*, for by reason of the reversal of the judgment as aforesaid and the entry of judgment for defendant, the said Margaret Cunnius is deprived of her property in suit without due process of law, contrary to the 14th amendment of the Constitution of the United States which, amongst other things, ordains "nor shall any State deprive any person of life, liberty or property without due process of law."

The said Margaret Cunnius therefore, through her attorney, Caleb J. Bieber, prays that the aforesaid judgment of the supreme court of Pennsylvania may be reversed, annulled and altogether held for naught, and that she may be restored to all things she hath lost by reason of said judgment, and that she may recover her costs therein.

CALEB J. BIEBER,
Attorney for Margaret Cunnius, the Plaintiff in Error.

133 *Parts of the Record Which Plaintiff in Error Thinks Necessary to the Consideration of the Assignments of Error.*

1. Docket entries in the record of the court of common pleas of Berks county, and plaintiff's *narr.*, or statement.
2. The following offers of evidence in the record of the court of common pleas of Berks county.

Plaintiff's Evidence.

Mr. BIEBER: We offer in evidence the inquisition proceedings, sur real estate of Catharine Cunnius, deceased, recorded in the register's office of Berks county, Real Estate Book vol. 27, p. 785.

We offer in evidence deed of John M. Cunnius and wife to the Reading School District, dated September 25, 1882, recorded in Deed Book vol. 145, p. 150, in the recorder's office of Berks county, in which this clause is contained: "Subject, however, to the right of dower therein of Margaret Cunnius, widow of Aaron Cunnius, amounting to the sum of five hundred and sixty-nine and 61-100 dollars ($569.61), remaining as a charge thereon."

We admit payment upon this dower of the interest to April 1, 1888.

(Plaintiff rests.)

Defendant's Evidence.

(Mr. Young stated the case for the defendant.)

Mr. YOUNG: The defendant offers in evidence proceedings in the orphans' court of Berks county to No. 91 January term, 1897, recorded in vol. 2, p. 550. This is for the purpose of offering the decree of the orphans' court of Berks county declaring Margaret Cunnius legally dead and directing the register of wills to grant letters of administration upon her estate in accordance with the provisions of the act of 1885.

Mr. BIEBER: Objected to, because it is inadmissible on the ground that the act of 1885 is unconstitutional, and that the proceedings are void, and that the register has no jurisdiction to appoint an administrator of the estate of a person who is alive.

The COURT: Admitted; exception for plaintiff.

Mr. YOUNG: We offer in evidence letters of administration on the estate of Margaret Cunnius, deceased, to John S. Gallagher, dated January 29, 1898.

We offer in evidence the release of John S. Gallagher, administrator of the estate of Margaret Cunnius, late of the city of Reading, Pa., deceased, to the Reading School District, whereby he remises, releases, quit claims and forever discharges the real estate hereinbefore more fully mentioned and described, of and from the interest on the said dower or thirds, and of and from all actions, suits, payments, accounts, reckonings, claims and demands whatsoever for or by reason thereof; dated the 16th day of May, 1898; recorded in Misc. Book 49, p. 213.

Mr. BIEBER: We object to the admission of this release on the ground that the payment to the administrator is not a defense to an action by the supposed decedent afterwards.

(Defendant rests.)

Plaintiff's Evidence in Rebuttal.

Mr. BIEBER: We offer in evidence the depositions of Margaret Cunnius, now Margaret Smith, the plaintiff in this case; of H. S. Beals, Samuel J. Jackson, Sarah E. Lynn and J. S. Daly, taken before C. A. Elliott, Esq., commissioner, in the city of Sacra-
134 mento, State of California, on the 23d day of July, 1900, on commission and interrogatories filed in the office of the prothonotary of Berks county, August 1, 1900.

Mr. YOUNG: For what purpose are the depositions offered?

Mr. BIEBER: These depositions are offered for the purpose of overcoming the presumption of death raised by reason of the proceedings in the orphans' court.

Mr. YOUNG: The offer is objected to for the reason that it is not competent for the plaintiff in this proceeding to attack the decree of

the orphans' court and the action of the register in the granting of letters of administration; and further, that the evidence offered is not the best evidence of which the nature of the case is susceptible.

The COURT: Admitted; exception for defendant.

3. Orphans' court proceedings on page 67 of the transcript of the record.

4. Judge Endlich's charge to the jury in the court below which was as follows:

Charge of the Court.

Judge Endlich charged the jury as follows:

GENTLEMEN OF THE JURY: The only question that would be open for submission to the jury in this case, for present purposes, is the question of the identity of the plaintiff in this case with the Margaret Cunnius who she claims to be. The evidence has been given, and the defendant's counsel very properly agrees that there is no question for submission to the jury, but that the jury would not be warranted in finding that the plaintiff is anybody but the person she claims to be; he, therefore, agrees that the jury shall render a verdict in this case for the plaintiff, which verdict will be subject to certain legal questions that we have not time to argue and dispose of now. Moreover, this verdict will be taken for the amount of the arrearages, together with compound interest, and we will determine, further on, whether that is more than she is entitled to or not. For present purposes, gentlemen, I instruct you to find a verdict for the plaintiff for the full amount of her claim, together with compound interest, aggregating $609.60.

(Exception noted for defendant to charge of court.)

5. Reserved points as follows

1. Whether, in view of the proceedings in the orphans' court to No. 91 January term, 1897, there can be any recovery by the plaintiff in this case.

2. Whether, in view of the proceedings in the orphans' court to No. 91 January term, 1897, there can be any recovery in this case beyond May 16, 1898.

3. Whether in this case, if the plaintiff is entitled to recover, she can recover more than the arrearages, with simple interest.

135 6. Rule for new trial and rule for judgment *non obstante veredicto* in the court of common pleas as follows:

And now, to wit: October 1, 1900, the defendant, by its counsel, Walter S. Young, moves the court for a rule to show cause why a new trial should not be granted, and in support of said motion files the following reasons:

I. The court erred in admitting the depositions of Margaret Smith, plaintiff, and others, for the purpose of proving that the plaintiff is living.

II. The court erred in admitting the depositions of Margaret Smith, plaintiff, and others, for the purpose of attacking collaterally the decree of the orphans' court of Berks county in the proceeding to No. 91 January term, 1897.

III. The jury erroneously allowed compound interest on plaintiff's claim.

WALTER S. YOUNG,
Attorney for Defendant.

And now, to wit: October 1, 1900, on motion of counsel for defendant, rule granted to show cause why a new trial should not be granted. Returnable *sec. reg.*

Per curiam,

G. A. ENDLICH, *Judge.*

In the Court of Common Pleas, Berks County.

MARGARET CUNNIUS, NOW MARGARET Smith, *vs.* THE READING SCHOOL DISTRICT. } No. 64, August Term, 1899.

And now, to wit: October 1, 1900, the defendant, by its attorney, Walter S. Young, moves the court for judgment in its favor upon the points reserved *non obstante veredicto.*

WALTER S. YOUNG,
Attorney for Defendant.

And now, to wit: October 1, 1900, on motion of defendant's counsel, rule granted to show cause why judgment should not be entered on the verdict in favor of the defendant, *non obstante veredicto.*

Returnable *sec. reg.*

Per curiam,

G. A. ENDLICH, *J.*

7. Opinion of Judge Endlich in the court below discharging said rule for judgment *n. o. v.* and said rule for new trial.

8. Docket entries in superior court of Pennsylvania, p. 42 of the transcript of record.

136 9. Assignments of error in the superior court of Pennsylvania page 47 of the transcript of record.

10. Opinion of the superior court of Pennsylvania page 49 of the transcript of record.

11. Docket entries of the supreme court of Pennsylvania, page 12 of the transcript of record.

12. Assignment of errors in the supreme court of Pennsylvania page 22 of said record.

13. Opinion of the supreme court of Pennsylvania page 23 of said transcript of record.

14. Assignments of error *In re* writ of error Supreme Court of the United States, which assignments of error are exactly the same as those included in this statement.

CALEB J. BIEBER,
Attorney for Margaret Cunnius, Now Margaret Smith, Plaintiff in Error.

And now to wit Jan. 14, 1904 the undersigned accepts service of the above statement of errors and parts of the record and has received a true and correct copy thereof.

F. ROLAND, JR.,
Secretary of the Reading School District, Defendant in Error.
FREDERICK W. NICOLLS,
Attorney and Solicitor of the Reading School District, Defendant in Error.

137 [Endorsed:] No. 529 October term 1903 Supreme Court of the United States Margaret Cunnius, now Margaret Smith, plaintiff in error *vs.* The Reading School District defendant in error Statement of errors and parts of the record deemed necessary to the consideration thereof. Caleb J. Bieber, attorney at law, Reading, Pa.

138 [Endorsed:] File No. 19,180. Supreme Court U. S. October term, 1903. Term No. 529. Margaret Cunnius now Margaret Smith P. E. *vs.* The Reading School District. Statement of errors & designation by pl'ff in error of parts of record, necessary to be printed, & acceptance of service of same Filed January 15, 1904.

Endorsed on cover: File No. 19,180. Pennsylvania supreme court. Term No. 165. Margaret Cunnius, now Margaret Smith, plaintiff in error, *vs.* The Reading School District. Filed January 2nd, 1904. File No. 19,180.